State Personnel Board, State of Colorado
Case Number 2000 B 135

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LORIEN SALAZAR,

Complainant,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

Hearing on this matter was commenced on June 2, 2000 before Administrative Law Judge G. Charles Robertson at the State Personnel Board Hearing, Suite 1450, 1120 Lincoln Street, Denver, CO 80203.

PRELIMINARY MATTERS

Respondent was represented by Stacy Worthington, Assistant Attorney General, 1525 Sherman Street, 5th Floor, Denver, CO. Respondent's Advisory Witness for the proceedings was Donice Neal, Warden, Canon Minimum Centers.

Complainant was represented by John Palermo, Esq., Denver, CO. Complainant was present for the evidentiary proceedings.

1. Procedural History

Complainant filed her Notice of Appeal on April 21, 2000. Complainant appealed her administrative termination for exhaustion of leave. Complainant only alleged arbitrary, capricious and/or contrary to rule or law claims and did not specifically preserve the issue of discrimination under CRS 24-50-125.3 (1999) or Board Rule R-9-3, 4 CCR 801 (1999).

Complainant filed her prehearing statement on May 16, 2000 and an amended prehearing statement on May 23, 2000. Respondent's prehearing and amended prehearing statements were filed May 18, 2000 and May 23, 2000 respectively.

On May 23, 2000, Complainant filed a Motion to Strike Respondent's

Prehearing Statement and for Summary Order Granting Requested Relief. Contemporaneously, Respondent filed a Motion to Dismiss.

The following day, Complainant requested, by way of correspondence, to preserve any claims related to discrimination under the American with Disabilities Act.

On June 1, 2000, Complainant's Motion to Continue Hearing was filed.

A. Complainant's Motion to Continue Hearing

Complainant argues that the hearing should be continued because she was unsuccessful at completing service of process on a witness and because she had a child care issue.

Complainant's Motion was **DENIED**. Complainant failed to demonstrate good cause for vacating the hearing date. Complainant had at least 45 days notice of when the hearing would occur and could have arranged for child care. In addition, it is Complainant's responsibility to timely obtain and serve any type of subpoena. Failure to do so cannot generally be good cause to delay a hearing.

B. Respondent's Motions to Dismiss

Respondent argues that the appeal of an administrative termination should be dismissed because Complainant bears the burden of going forward and burden of production (i.e., burden of proof) and that Complainant made admissions in her own pleadings that she had (1) exhausted all leave; and (2) she had a disability preventing her from doing the essential functions of her job and thus was not qualified to any protections under the American with Disabilities Act. A supplemental motion to dismiss was filed by Respondent on May 25, 2000 which further argued that Complainant's claim related to discrimination, if any, should be dismissed because it was untimely raised, divesting the Board of jurisdiction. See: 24-50-125.3, CRS (1999).

Complainant filed Complainant's Response to Motion to Dismiss and Supplemental Motion to Dismiss on June 1, 2000, one day before hearing.

Ruling on Respondent's Motion was stayed until the time of hearing. At hearing, Respondent argued that the Board lacked jurisdiction to rule on the claim of discrimination based on *State Personnel Board v. Gigax*, 659 P.2d 693 (1983) and *Cunningham v. Dep't of Highways*, 823 P.2d 1377 (Colo. App. 1991). These two cases stand for the proposition that unless Complainant preserves her claims and files the appropriate appeal within 10 days after she received notice of the termination, the Board no longer has jurisdiction.

Complainant presented no authority which would support the position that the claims should be preserved. Complainant merely argues that because she said other employees were treated differently, a claim for discrimination based upon the American with Disabilities Act is preserved. Complainant's Response to Respondent's Motions to Dismiss is not persuasive and is insufficient.

Based on statute and the precedent associated therewith, Respondent's Motion is **GRANTED**, **in part.** Complainant's claim of discrimination based under the ADA or upon disability is precluded. Complainant's claim that Respondent acted arbitrarily, capriciously, or contrary to rule of law in separating her from work for exhaustion of leave is preserved.

C. Complainant's Motion to Strike Respondent's Prehearing Statement

Complainant argues that Respondent failed to timely file a Prehearing Statement on May 15, 2000 and thus, any prehearing statement filed thereafter should be deemed untimely and stricken.[1]

Ruling on Complainant's Motion was stayed until the time of hearing. At the time of hearing, relying primarily upon *J.P. v. District Court*, 873 P.2d 745 (Colo. 1984), Respondent argued that sanctions for failure to comply with disclosure rules are applied at the discretion of the trial court and should not be disturbed absent abuse of discretion. Respondent further argued that in exercising discretion in imposing sanctions, such sanctions must be commensurate with the seriousness of the disobedient party's conduct. And, it was further argued that in order for the Board to fulfill its mission of conducting fair hearings, the prehearing statement should not be stricken.

In this instance, prehearing statements in part act so as to disclose a party's theory of the case, identify potential witnesses and identify potential exhibits. Here, Respondent disclosed in the termination letter that Complainant was being terminated based on an exhaustion of administrative leave. Clearly, the grounds for the termination were identified early within the process. Prehearing statements were due May 15, 2000 with amended prehearing statements due May 23, 2000. Respondent was 3 days late in filing its prehearing statement. In that prehearing statement, the only witnesses identified were the appointing authority/advisory witness, and Brad Rockwell, the ADA Coordinator for the facility. While some surprise might be attributed to the fact that Rockwell was identified on the prehearing statement, it cannot be argued that the three day delay in disclosure caused such undue surprise as to warrant striking Respondent's prehearing statement.

[1] It must be noted that Complainant's Prehearing Statement relies upon exhibits and witnesses identified by Respondent in any prehearing statement. As a result, striking Respondent's Prehearing statement would also impact Complainant's Prehearing Statement(s).

In addition, Complainant endorsed all of Respondent's witnesses and exhibits in its prehearing statement. Thus, to strike all of Respondent's prehearing statement would be to work as a detriment to Complainant because technically, Complainant would not have Respondent's witnesses to endorse in its case in chief.

As held in *J.P.,* witness preclusion for discovery violation is a severe sanction and should only be invoked if there has been serious misconduct. No such serious misconduct occurred here to warrant witness preclusion. In addition, since Complainant has the burden of proof in this matter, an opportunity for rebuttal remains which would allow Complainant to introduce additional evidence in the event it is necessary for Complainant's theory of the case. Complainant's Motion to Strike is **DENIED**.

HOWEVER, IT MUST BE NOTED THAT RESPONDENT DID VIOLATE THE PREHEARING ORDER BY SUBMITTING ITS PREHEARING STATEMENT LATE. UNDER DIFFERENT CIRCUMSTANCES, WITNESS PRECLUSION AND EXHIBIT PRECLUSION, REMAIN A VIABLE SANCTION THAT THIS COURT WILL ENFORCE.

2. Witnesses

Complainant called the following witnesses in its case-in-chief :

Name	Position and Location
Lorien Salazar	Complainant Complainant was also called in her Rebuttal Case
Brad Rockwell	Legal Director & American with Disabilities Act Coordinator Dept. of Corrections

Respondent, called the following witnesses in its case-in chief:

Name	Position and Location
Donice Neal	Warden Department of Corrections
Brad Rockwell	American with Disabilities Act Coordinator Dept. of Corrections

3. Exhibits

Complainant *did not introduce any exhibits* in its case in chief. Respondents introduced the following exhibits:

Exhibit #	Type	Comments
1	Termination Letter 4/11/00	No objection
3	Request for Leave without Pay 3/29/00	No objection

ISSUES

For the purposes of this administrative hearing, the issues are characterized as follows:

1. Did the Complainant commit the acts for which termination was imposed?

2. Was the imposition of termination for exhaustion of leave within the reasonable range of available alternatives to the appointing authority?

3. Were the actions of the Respondent arbitrary, capricious, and/or contrary to rule or law?

4. Is Complainant entitled to an award of attorney fees and costs pursuant to CRS 24-50-125.5 (1999)?

FINDINGS OF FACT

(parentheticals refer to exhibits or witness' testimony)

I. Background of Complainant and Complainant's Medical Condition

1. Complainant was a Corrections Officer I with the Canyon Minimum Center. (Complainant). She has been with the Department of Corrections since 1997. (Complainant, Ex. 3).

2. Her duties as a Corrections Officer 1 included monitoring inmates, monitoring contraband, and making sure inmates followed the rules. (Complainant).

3. In September 1999, Complainant was involved in an automobile accident. (Complainant, Exhibit 3).

4. The accident was not work-related. As a result of the accident, Complainant suffered head injuries. (Complainant). She incurred a

post concussion head injury, motor skill problems, speech and learning impediments. (Complainant.)

5. Since her accident, Complainant has only been able to work 2 days, including October 18, 1999, at the facility as a Corrections Officer I. (Complainant).

6. In an attempt to work, Complainant participated with the Colorado State Employees Assistance Program. (Complainant).

7. Complainant admits that she had the following problems in performing her duties subsequent to the September 1999 accident:

- She could not talk on the radio
- Her speech was slurred
- She would get overwhelmed by high levels of interaction amongst staff and inmates
- Movement would bother her
- She was not able to think rationally in the event fights broke out at the facility
- She had problems maintaining balance
- She had a blind spot in her left eye
- Her night vision was impaired
- She experiences headaches which make her "tired" and require medication

(Complainant).

II. Department of Corrections

8. The Canyon Minimum Center is a facility within the Department of Corrections. Since January 1999, the warden of the facility is Donice Neal. (Neal). She is the appointing authority for the facility. (Neal).

9. Warden Neal has been with the Department of Corrections for 15 years, and has been a warden for 14 years in various facilities including Colorado State Penitentiary, the Denver Regional Diagnostic Center, and the Colorado Womens' facility. (Neal).

10. DOC uses Corrections Officers I to maintain inmate control.

11. The Department of Corrections has used various methods for supporting its employees in circumstances which prevent the employees from returning to work. For instance:

- DOC has provided "light duty" for employees who are in the process of recovering from some work related injury. In order to

do so, the employee must have a release from a physician allowing light duty work
- Individual facilities or staff have created "dress down" days which apparently are some type of fund raising mechanism
- DOC can utilize and provide shared leave under Director's Procedure P-5-12, 4CCR 801 (1999)
- DOC can provide leave without pay (P-5-23, 4 CCR 801) (1999)

12. DOC *may* have provided shared leave to other employees at the Canyon Minimum Center. (Complainant). At least one employee with previous heart issues, had been in an accident which resulted in physical injuries. (Complainant, Rockwell). In this instance, that employee received light duty and may have been off work completely for up to 6 months.

13. With the exhaustion of his leave, including leave associated with the Family Medical Leave Act, the employee returned to work with a full release to conduct all duties. (Rockwell).

14. DOC does not have a established mechanism at each facility for the use of shared leave. It is controlled by the central human resource services division, despite appointing authorities being based at each facility. (Neal, Rockwell).

III. The Separation of Complainant from DOC

15. Complainant never received a release from her physician to return to work.

16. Complainant exhausted her sick leave and annual leave on September 2, 1999. (Exhibit 1).

17. Complainant exhausted her Family Medical Leave on December 23, 1999. (Exhibit 1).

18. Complainant's short term disability was exhausted on April 1, 2000. (Exhibit 1).

19. With the expiration of Complainant's short-term disability, Complainant requested to be placed on leave without pay. She indicated she did not know when, *if ever*, she would be able to return to work (Complainant, Exhibit 3). At that time she did not express any desire for any other positions at DOC.

20. Director's Procedures regarding leave provide, in part:

P-5-1, 4 CCR 801 (1999)	Appointing authorities are responsible for approval of all types of leave, subject to these provisions. They are expected to use good business judgment and leave management practices to balance the needs of employees with the state's, to prevent abuse, and to comply with all legal requirements.
P-5-10, 4 CCR 801 (1999)	If an employee has exhausted all sick leave and is unable to return to work, accrued annual leave will be used. If annual leave is exhausted, leave-without-pay may be granted or the employee may be administratively discharged by written notice after pre-termination communication. The notice must inform the employee of appeal rights and the need to contact PERA on eligibility for retirement. No employee may be administratively discharged if FML and/or short-term disability leave (includes the 30-day waiting period) apply and/or if the employee is a qualified individual with a disability who can reasonably be accommodated without undue hardship. When an employee has been terminated under this procedure and subsequently recovers, a certified employee has reinstatement privileges.

21. After providing adequate notice of a meeting, and meeting with Complainant, Neal decided to administratively terminate Complainant from DOC. (Complainant, Exhibit 1). In reaching such a conclusion, Neal considered the needs of the institution including Complainant's admissions that she could not work, that all leave was exhausted, that the department had a need to continue to be able to fully staff its facilities. Neal determined that utilizing transfer of positions would not necessarily be helpful because of Complainant's admissions regarding her ability to fulfill her duties. (Neal).

DISCUSSION

I. INTRODUCTION

Certified state employees have a property interest in their positions and may only be terminated for just cause. *Department of Institutions v. Kinchen,* 886 P.2d 700 (Colo. 1994). Respondent's action of administratively terminating Complainant is an action appealable to the State Personnel Board. In this type of administrative action affecting a certified state employee, the burden of proof is on the employee**, not the employer**, to show by a preponderance of the evidence that Respondent's acts or omissions were

arbitrary, capricious, or contrary to rule and/or law. See: *Department of Institutions v. Kinchen,* 886 P.2d 700 (Colo. 1994); *Hughes v. Dept. of Higher Education*, 934 P.2d 891 (Colo. App. 1997).

In *Charnes v. Lobato*, 743 P.2d 27, 32 (Colo. 1987), the Supreme Court of Colorado held that:

> Where conflicting testimony is presented in an administrative hearing, the credibility of witnesses and the weight to be given their testimony are decisions within the province of the agency.

See also: *Colorado Motor Vehicle Dealer Licensing Board v. Northglenn Dodge, Inc.,* 972 P.2d 707 (Colo. App. 1999). In determining credibility of witnesses and evidence, an administrative law judge can consider a number of factors including: the opportunity and capacity of a witness to observe the act or event, the character of the witness, prior inconsistent statements of a witness, bias or its absence, consistency with or contradiction of other evidence, inherent improbability, and demeanor of witnesses. Colorado Jury Instruction 3:16 addresses credibility and charges the fact finder with taking into consideration the following factors in measuring credibility:

1. A witness' means of knowledge;
2. A witness' strength of memory;
3. A witness' opportunity for observation;
4. The reasonableness or unreasonableness of a witness' testimony;
5. A witness' motives, if any;
6. Any contradiction in testimony or evidence;
7. A witness' bias, prejudice or interest, if any;
8. A witness' demeanor during testimony;
9. All other facts and circumstance shown by the evidence which affect the credibility of a witness.

All of these factors were considered in evaluating witnesses' testimony. Additionally, all evidence introduced was considered.

II.

1. Complainant's Separation from Service.

Complainant argues that she should not be separated from service despite having exhausted all types of leave. She contends, in part, that she is treated differently than other employees and that the appointing authority should have somehow accommodated her needs by allowing her to take leave without pay for an indefinite period of time. By acting in such a way, Complainant maintains that the appointing authority acted arbitrarily, capriciously, or contrary to rule and/or law.

Respondent simply argues that the appointing authority, pursuant to Director's procedures, had an employee who had exhausted leave and based on admissions made by Complainant, the appointing authority had no reason to believe she would ever be able to return to being a Corrections Officer I.

Complainant has failed to meet her burden of proof that the appointing authority acted arbitrarily, capriciously, or contrary to rule or law.

The Director's Procedures clearly allow an appointing authority to exercise discretion and to terminate an employee when all the employee's leave is exhausted. Warden Neal's testimony supports that she had to have the position filled and that she could not leave it open indefinitely. Indeed, a DOC appointing authority has an obligation to staff its programs and not leave positions vacant in order for the department to maintain is statutory mission of guarding inmates. To leave positions vacant is to suggest that the program is not fully operational or that there is no need for the position.

The only evidence introduced by Complainant was her testimony that she was "treated different" from other DOC employees. Complainant failed to produce any additional witnesses or demonstrative evidence to support her theory of the case. In essence, Complainant had the burden of demonstrating that other employees were granted indefinite leave without pay and that she was arbitrarily, capriciously, or contrary to rule/law denied such an opportunity. The only evidence Complainant proffered was that one other employee had been on a similar type of leave for a period of time. But, Respondent successfully demonstrated that the employee in question was able to come back to work, without restriction, once leave was utterly exhausted. The fact that leave sharing programs and other mechanisms for manipulating leave simply exist is not persuasive in demonstrating the appointing authority acted arbitrarily or capriciously in exercising a decision to separate Complainant from service.

A caveat exists with regard to an appointing authority's ability to exercise discretion and separate an employee for exhaustion of leave. The caveat relates to an employee being a qualified individual with a disability. The issue of discrimination based upon disability and whether any protections afforded by the American with Disabilities Act should be afforded to Complainant was addressed in the preliminary matters of this hearing. It was ruled that Complainant had not preserved a claim of *discrimination based on disability* under Section 24-50-125.3, CRS (1999). As a result, no analysis of such a claim is included in this decision. *However*, Director's Procedures provide no employee may be "administratively discharged . . . if the employee is a qualified individual with a disability who can reasonably be accommodated without undue hardship." This is provided for by rule, and does not make specific reference to federal or state statute.

Thus, a *compelled* analysis must occur as to whether or not Complainant was disabled as contemplated by Director's Procedure P-5-10. Complainant did demonstrate that she was a person with a disability. Her symptoms demonstrated that her impairment affected a major life activity. Respondent does not contest that Complainant at least has an impairment. But, it appears Complainant was a not a qualified individual with a disability. A "qualified individual with a disability" is an individual with a disability who, with or without reasonable accommodations, can perform the essential functions of the employment position such individual *holds or desires*. She had worked for DOC for a few years as a Corrections Officer. Complainant's own testimony and admissions in pleadings support the fact that she could not perform the essential functions of the job without an accommodation. In fact, her own testimony supports the notion that she could not perform ANY functions of the job without some type of accommodation. Complainant basically admitted she could not perform **any of the functions** of the Corrections Officer position. Her own prehearing statement states: "Complainant has a disability which prevents her from returning to **her job**." At this point, it is critical to analyze whether or not a reasonable accommodation could have been used to allow Complainant to return to a position at DOC. In *Smith v. Midland Brake, Inc., a Div. of Echlin, Inc.*, 180 F.3d 1154 (C.A.10 (Kan.) 1999) the 10th Circuit Court of Appeals identified a number of elements in considering whether or not a qualified individual with a disability should be given another position (or job) as a reasonable accommodation. Such elements include:

1. the parties must engage in an interactive process to determine if there are any reasonable accommodations;
2. any reassignment be limited to existing jobs within the "company;"
3. any existing job must be vacant;
4. an employer need not violate other important fundamental policies underlying legitimate business interests;
5. reassignment does not require promotion;
6. employers may choose the proffered reassignment;
7. employers need offer only a reassignment as to which the employee is qualified with or without reasonable accommodation; and
8. no reassignment need occur if it would create an undue hardship on the employer.

While the record is scarce of whether or not there was an interactive process, it is clear that at least some communication occurred which demonstrated that Complainant was disabled and unable to return to the Corrections Officer position or work. At the time of her separation, as demonstrated by Exhibit 3, Complainant indicated the only reasonable accommodation for her was to be on leave without pay indefinitely. Yet, a reasonable accommodation should have allowed her to meet the essential functions of a job and be qualified. And, based on her admissions, DOC could not develop any reasonable accommodations that

would allow Complainant to fulfill the job functions as a Corrections Officer or any other position Thus, she could not be transferred to any facilities in a DOC position. And, to leave the position unfilled indefinitely is not a reasonable accommodation and can only be viewed as creating an undue hardship. Thus, the appointing authority was within her authority to separate Complainant from her employment. Further, Complainant's testimony suggests there are no positions at DOC which she could perform without DOC having to engage in job restructuring.

Complainant failed to show by a preponderance of evidence that there were any jobs at the Department of Corrections for which she was qualified with or without reasonable accommodation, that she was qualified for any vacant positions (if any vacant positions existed), or that any reassignment would have been reasonable and not created an undue hardship. Further, the "reasonable accommodation" of indefinite leave offered by Complainant would have created undue hardship.

2. Complainant is not Entitled to an Award of Attorney Fees and Costs pursuant to CRS 24-50-125.5 (1999).

Given the above findings of fact, Respondent's action of terminating Complainant does not demonstrate that Respondent acted frivolously, in bad faith, maliciously, as a means of harassment, or that its actions were groundless. See: CRS 24-50-125.5 (1999) and Board Rule R-8-38, 4 CCR 801 (1999). Complainant failed to show that the action was not based on evidence or the law as presented. Nor did Complainant show that the personnel action was pursued to annoy or harass, was abusive or stubbornly litigious. It cannot be said that the action was disrespectful of the truth. And, both sides provided some competent evidence in litigating the action.

CONCLUSIONS OF LAW

1. Complainant had exhausted all types of leave and was unable to return to work. For the purposes of Director's Procedure P-5-1 and P-5-10, Complainant was an individual with a disability who could be not be reasonably accommodated.

2. The actions of the appointing authority were within the reasonable range of available alternatives to the appointing authority.

3. Respondent's actions related to the events of the decision to terminate Complainant were not arbitrary, capricious, and/or contrary to rule or law.

4. Complainant is not entitled to an award of attorney fees and costs pursuant to CRS 24-50-125.5 (1999).

ORDER

Respondent's actions are AFFIRMED.

Dated this 3rd day of July 2000

G. Charles Robertson
Administrative Law Judge
State Personnel Board
1120 Lincoln Street, Suite 1420
Denver, CO 80203

CERTIFICATE OF MAILING

This is to certify that on the _____ day of _____, 2000, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRTIVE LAW JUDGE and APPEAL RIGHTS, in the United States mail, postage prepaid, addressed as follows:

John Palermo, Esq.
3333 Quebec Street, #7500
Denver, CO 80207

And in the interagency mail, addressed as follows:

Stacy L. Worthington
Assistant Attorney General
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